United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

75-4224

75-4225

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN STEVEDORES, INC., and MICHIGAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

—against—

VINCENT SALZANO,

Respondent,

—and—

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS REVIEW BOARD U.S.D.L.

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT, VINCENT SALZANO

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On Brief

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Questions Presented

In addition to the issues presented by Petitioners, a fee under Section 33 U.S.C. 928(a)(b) must be considered by the Court for services rendered by claimants' attorneys, if successful, in connection with the prosecution of this claim.

Statement of Facts

This claim arises under the provisions of the Longshoremen and Harbor Workers Act, 33 U.S.C. 901 et seq. hereinafter referred to as Act. This Act provides for compensation benefits to be paid and provided to employees injured

in the course of employment upon navigable waters of the United States.

The Respondent, Vincent Salzano, hereinafter referred to as the Claimant, was in the employ of American Stevedores, Inc., which employer was insured for compensation benefits under the Act by the Michigan Mutual Liability Insurance Company, both hereinafter referred to as the Employer/Carrier. The claimant sustained an accidental injury in the nature of a posterior wall infarction on January 3, 1966, while working for said employer. On April 18, 1966, the Claimant sustained an extension of this myocardial infarction. The Employer/Carrier were held liable under the Act for both the original infarction that ocurred on January 3, 1966, as well as the extension thereof that occurred on April 18, 1966. (Supp. App. SA 15)

The claim for compensation benefits was filed under the provisions of the Act. The carrier filed a Notice of Controversy in 1966 disclaiming liability, following which there was a trial before Deputy Commissioner Michael J. Collura who rendered a decision and order and award of compensation in favor of the claimant on May 31, 1967 (SA 13-18). Pursuant to said order the carrier paid the claimant compensation benefits until July 30, 1972 for temporary total disability and terminated on said date, *not because the claimant recovered but only because the maximum in the amount of $24,000 had been paid for temporary total disability as provided under the old Act,*[1] *Section 914 (m).* (14a)

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[1] This brief will discuss the Act in effect prior to November 26, 1972 and the Act as amended after November 26, 1972 the latter will be referred to as the new Act and the former as the old Act.

There was no appeal taken to the U.S. District Court by the Employer/Carrier as provided for by the old Act (from the Order of Dep. Com. Collura mentioned *supra*). In the interim between May 31, 1967, when the Formal Order was handed down by Deputy Commissioner Collura and said date of July 30, 1972, the carrier made a number of applications under Section 922 as provided by the old Act to have payments to the claimant reduced. The Deputy Commissioner's office denied every application made in behalf of the carrier (14a).

The claimant made a timely claim that he was permanently and totally disabled by reason of his accident and the consequences thereof. Under Section 914(m) of the old Act, there is no limitation for compensation payments for permanent total disability; therefore, the claimant is eligible to continue receiving said compensation payments indefinitely. In addition, the claimant made application for increased benefits as provided by the new Act, Section 910 (h)(1)(2)(3). The carrier controverted this claim on the issue of permanent total disability and pursuant to the amended provisions of the new Act 922(d) the claim was tried before an Administrative Law Judge McGrail on September 25, 27, 1974. Following the trial a decision in favor of the carrier was rendered. The claimant appealed this decision to the Benefits Review Board as provided by Section 921(c) of the new Act. The Benefits Review Board reversed the decisions of the Administrative Law Judge on August 20, 1975 (App. 12a-19a) and directed that payment of compensation be continued to the claimant.

The claimant filed Notice of Appeal from the decision of the Administrative Law Judge to the Benefits Review Board dated December 9, 1974 and sent the attorneys for the Employer/Carrier a copy of said Notice on December

16, 1974 (Sup. App. 19-20a). The Solicitor of Labor filed a similar appeal to the B.R.B. dated December 3, 1974 and mailed to Minore and Manes on December 3, 1974. (Sup. App. 21-24) There was no Notice of Appeal filed by the attorneys for the Employer/Carrier on the issue of unconstitutionality. However, relief was sought by the carrier under Section 910(h) of the new Act on the grounds that the increased benefits are unconstitutional. This relief was sought by means of its reply brief on appeal before the Benefits Review Board and not by a Notice of Appeal as is required.

The Director of the Office of Workers Compensation Programs intervened in this case on December 3, 1975 (after the decision rendered against the claimant by the Administrative Law Judge). This intervention was opposed by Notice of Motion by the carrier on the grounds that the Director was not a party to the proceedings. The Benefits Review Board denied this Motion. There was no appeal taken from the denial of this Motion.

The Director and claimant argued before the Benefits Review Board that the Administrative Law Judge's decision disallowing the claim be reversed and that the new law was constitutional. The Benefits Review Board granted the relief sought by the claimant and the Solicitor of Labor. The carrier has appealed the decision of the Benefits Review Board on the issue of the legality of reversing the decision of the Administrative Law Judge, as well as the issue of the constitutionality of the new Act as provided under Section 910(h) for increased benefits. At the present time claimant is being paid to date as required by the Act pending an appeal (Sec. 921(c)) but he is not being paid for the increased benefits as provided by the amendments mentioned *supra*.

POINT I

A decision of the Administrative Law Judge can be reversed by the Benefits Review Board.

33 U.S.C. 921(b)(3) provides that either party may appeal the decision of an Administrative Law Judge to the Benefits Review Board on a question of law and fact. The Benefits Review Board may reverse a ruling of the Administrative Law Judge, if not made in accordance with the law and facts as developed in the record.

As a matter of law, the decision of the Administrative Law Judge was not substantiated by the factual record as a whole, when considered in the light of Compensation Law. Section 920(a) states,

> "In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed in the absence of substantial evidence to the contrary
>
> (a) That the claim comes within the provisions of the Act."

Doubts, including factual doubts are to be resolved in favor of the Claimant. *Friend* v. *Britton,* 220 F. 2d 820, U.S. Ct. App. D.C. 1955. The scope of review by the Courts is strictly limited. The judgment of the Benefits Review Board must be accepted if warranted in the record and reasonable basis in law is found. *O'Loughlin* v. *Parker,* 163 F. 2d 1011, 4th Cir., 1947; *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U.S. 467, 1947; *Wheatly* v. *Adler,* 407 F. 2d 307 D.C. Cir. 1968.

Section 921(b)(3) states:

> "* * * The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's Order shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of amounts required by an award shall not be stayed pending a final decision in any such proceeding unless ordered by the Board * * *"

The Benefits Review Board has clear authority and jurisdiction to reverse an Administrative Law Judge's decision. Once the Benefits Review Board makes a decision, its findings of fact are conclusive and not subject to review by the Courts except as a question of law.

POINT II

The record as a whole substantiates the claim for a permanent disability.

The record must therefore be examined in order to determine if there is substantial evidence to sustain a finding that the claimant has a permanent medical disability. For the moment, whether this medical condition is to be considered total or partial is immaterial. As will be argued hereinafter, it is the claimant's position that if there is any degree of permanent injury it must be considered total

disability as a matter of law and res judicata by reason of the Order of Dep. Com. Collura (Sup. App. 13-18).

The medical evidence presented by both sides from the inception of this claim to the last trial before the Administrative Law Judge on September 25, 27, 1974 was elicted from Drs. Sarney, Shub and Reich. All physicians were duly qualified internists specializing in the treatment of cardiac patients. Dr. Sarney was the original attending physician who testified at the trial on April 19, 1967 (Sup. App. 11) before Deputy Commissioner Collura. Unfortunately, Dr. Sarney died sometime before the second trial held before the Administrative Law Judge. Dr. Shub testified for the claimant and Dr. Reich for the Employer/Carrier. Dr. Shub stated that the claimant has a permanent damage to his heart by reason of the myocardial infarction he sustained on the date of the accident January 3, 1966, as well as the extension thereof that the claimant sustained on April 18, 1966 (Supp. App. 1-6, Tr.September 25, 1974).

Dr. Reich testified that he examined the claimant on July 1, 1966, June 12, 1970, April 17, 1972 and May 11, 1973. On all said occasions, he characterized the disability as a mild partial disability (Tr. September 25, 1974, Sup. App. 8). The EKG's taken by this physician still reveal the evidence of the residuals of the posterior-lateral wall infarction caused by the accident. In addition, premature ventricular contraction (extra heartbeats) found by Dr. Sarney were still present. Dr. Reich also stated that there was a *psycho-genic and musculo-skeletal deterioration* (Supp. App. 9-12).

As is evident from the trial record, the specialists have classified the claimant as being medically disabled if not

in whole, as per Drs. Sarney and Shub, at least in part per Dr. Reich.

The issue of the present disability of the claimant was clouded by the underlying arteriosclerotic heart disease at the time of the trial before the Administrative Law Judge. That the claimant had this condition and that it was a symptomatic is not denied (Supp. App. 3). That the myocardial infarction that ensued following the exertion at work occurred in the presence of the said underlying disease as described is also not denied (Supp. App. 3). In fact, if the claimant did not have the underlying arteriosclerotic heart disease, he never would have incurred the mycardial infarction following the heavy lifting he did at work.

At the time of the occurrence of this episode, the claimant experienced chest pains (angina pectoris) and this angina has continued from the date of the accident up until the present time.

Arteriosclerosis is a progressive condition. However, it can remain asymptomatic throughout the lifetime of a person (Sup. App. 5-6). If one is to ascribe the angina syndrome to the underlying arteriosclerotic heart condition where did the chest symptoms post-trauma terminate and when did the underlying condition causing the angina begin? Nowhere in the record is this explained nor indeed is it capable of such defensive refinement, since there is no difference between post-traumatic myocardial infarction, angina pectoris and angina pectoris caused by the underlying systemic condition. The symptoms and signs are the same.

The Act requires facts, not speculation or conjecture to overcome the presumption of compensability, *Steel* v. *Adler,* 269 F.S. 376 D.D.C. 1967. The burden is on the Employer/Carrier to show by substantial evidence that the presumptions are overcome. *Mitchel* v. *Woodeworth,* 449 F. 2d 1097, D.C. Cir. 1971.

The decision of the Administrative Law Judge made no specific finding that the claimant fully recovered from the effects of the myocardial infarction and extension thereof nor could he make such a finding especially when the Carrier's own consultant Dr. Reich testified the medical condition was the same throughout all his examinations covering a period of seven years. Therefore, it was the obligation of the adjudicating officer under the Act to evaluate said disability in the light of the economic factors such as age, education, industrial background etc. as was done by Dep. Com. Collura (Supp. App. 3-4). *McGrath* v. *Hughes,* 264 F. 2d 314, 2d Cir. 1959; *Eastern SS Lines, Inc.* v. *Monahan,* 110 F. 2d 840.

The present controversy arose by reason of the fact that the carrier had paid the maximum under the old Act, Section 914(m) for temporary total disability. All of the payments made by the carrier herein were pursuant to the Order of the Deputy Commissioner dated March 31, 1967 (Supp. App. 5-6). This decision evaluated the claimant's industrial background, age, education, etc. The Deputy Commissioner found the claimant to have a *"negligible"* earning capacity and totally disabled." The employer/carrier did not appeal this decision but did make several applications to have the payments reduced on the grounds of a partial disability before the maximum pay-

ments had been completed under the Act. Each and every time the employer/carrier made this application it was denied by the Deputy Commissioner.

When payments were stopped on July 30, 1972, the claimant made application to have the injury considered permanent, thereby invoking that part of Section 914(in) which would permit continued payments for permanent total disability. Since there had been a decision that the claimant was already totally disabled by reason of his lack of education and industrial background, the only thing that had to be proven on the record was, in fact, his condition was no longer temporary but is now permanent.

The carrier maintained that the claimant was not totally disabled. At the trial before the Administrative Law Judge, the position of the carrier was that the claimant was not totally disabled (Supp. App., Tr. 7). The only other issue raised by the carrier was the constitutionality of the new Act for the increased payments. It follows that it conceded that the claimant was medically partially disabled and since this disability had already been interpreted by Dep. Com. Collura (Sup. App. 3-4) under the Act, the only remaining issue for the Administrative Law Judge was to consider the question of permanency. As stated above, it appears that the underlying arteriosclerotic heart disease clouded the issue of permanency due to the industrial accident and same was never considered by the Administrative Law Judge. Even assuming, without conceding that the underlying arteriosclerotic heart disease did play a part in the claimant's present disability it does not follow, ipso factor, that the effects of the accidental injury terminated. To illustrate

this point grossly, if a claimant had a portion of both lower extremities amputated at the ankles and such a person were to be found to be totally disabled within the meaning of the Act, if thereafter, he sustained a non-industrial accident, causing an amputation of both lower extremities above the knees, this additional medical disability would not cure the prior compensable disability that he had sustained and therefore, no award of continuing compensation to him could be terminated by reason of the additional disability imposed. To the same effect in this case, if instead of advancing arteriosclerotic heart disease, the claimant had cancer which became progressively disabling, it would similarly not affect any compensation benefits that were due him by reason of the additionally imposed medical disability by reason of the cancer.

POINT III

Employer/Carrier failed to timely raise the issue of constitutionality under Section 10(h)(3) of the Act.

The claimant appealed the decision of the Administrative Law Judge rendered on November 18, 1974. This appeal was filed with the office of the Deputy Commissioner on November 22, 1974. Notice of Appeal by the claimant was dated December 9, 1974. Notice of Appeal by the Director of the Office of Workmen's Compensation Programs was dated December 3, 1974 and mailed to the carrier's attorney on December 3, 1974. The employer/carrier was therefore on sufficient notice by both Respondents on December 3, 1974 and December 16, 1974 that two parties were appealing the decision of the Administrative Law Judge which was adverse to the claimant and there was a pos-

sible reversal by the Benefits Review Board to be anticipated. The time limitation for filing an appeal from a formal order of the Administrative Law Judge is limited to 30 days as per Section 921(a), 919(e), 20 CFR 802.205 (b). Allowing the employer/carrier the most liberal interpretation of the Act it had 30 days from December 16, 1975 to protect its right of appeal on the issue of constitutionality. Therefore, as stated by the Benefits Review Board in its decision dated August 20, 1975 (*supra*), it cannot now be heard.

POINT IV

The amended act is constitutional.

Congress has the authority to validly enact "retroactive" law and the exercise of this discretion is not unconstitutional. One of the amended provisions of the Act has already been decided in the Second Circuit in the case of *Overseas African Construction Corp.* v. *McMullen,* 500 F 2d 1291 (1974). In said case, the claimant, Mr. McMullen, was injured prior to the effective date of the Act as amended November 26, 1972. The claim took a long time in processing before the Deputy Commissioner—Second Compensation District. After a favorable decision to Mr. McCullen, the employer/carrier appealed to the U.S. District Court as provided by the old Act. The District Court decided in favor of the claimant but denied counsel fees to claimant's attorneys under the new Act Section 928. Both sides appealed to the Second Circuit Court of Appeals. The Court decided in favor of the claimant on the issue of disability and in favor of the claimant on the issue of attorney's fees under the new Act. It was the opinion

of the Court that the amended Section 928 providing for attorney's fees was applicable, even though the injury sustained by the claimant was incurred prior to November 26, 1972. Since the latter case, similar decisions were rendered in other cases, *Dillingham Corp.* v. *Massey,* 505 F. 2d 1126, 9th Cir. 1974; *Matthews* v. *Walter,* No. 73-7152, D.C. Cir. 1975; *Bradley* v. *Richmond School Board,* 416 U.S. 696, 1974. Perhaps one of the most prominent laws affecting the imposition of retroactive liability upon employers is the Black Lung Benefits Act of 1972 (P.L. 92-303, 86 Stat. 150). Said act was sustained by the Court in the *National Independent Coal Operators Association* v. *Brennan,* 372 F. Supp. 16, D.D.C. 1974. It imposed liability on employers for disability or death due to pneumonoconiosis occurring to an employee prior to the enactment of the Black Lung Act. In this case it was the intent of Congress under the Act to increase compensation benefits for injuries that occurred prior to November 26, 1972. See Senate Report No. 92-1125, 92nd Cong. 2d Sess, pages 6, 22 and House Report No. 92-1441, 92nd Cong. 2nd Sess. pages 9, 19. There is no mention in the carrier's brief about the Constitutionality of Section 944, which provides for the method of accumulating monies in the Special Funds for the increased benefits under the new Section 910(h) be paid and for the reimbursement to the Special Fund for these increased payments to claimants by means of assessing the employer/carriers. Ultimately, it is the consumer who actually pays for the cost of Workmen's Compensation Benefits because the cost of production must of necessity include the cost of Workmen's Compensation premiums paid to carriers.

A similar statute affecting increased benefits to pre-amendment accidents appeared in the case of *Price* v. *All American Eng. Co.*, 32 A 2d 336, Delaware 1974. It was held in said case that the assessment against the employer/carrier for increased benefits was a valid exercise of police power. In this case, if the claimant is found to be permanently totally disabled the carrier is liable for said continuing disability payments at $70 per week and the Special Fund is liable for any increase above $70 per week under Section 910(h) mentioned above. Under the old Act, the employer/carrier was liable for permanent total disability without limitation as to payments at $70 per week. The new Act effective November 26, 1972, provided for increased benefits to be paid by the employer/carrier and ultimately reimbursed to them on application to the Secretary of Labor which reimbursement was to be paid out of the Special Fund.

CONCLUSION

Upon the foregoing, it is submitted that the decision of the Benefits Review Board which finds the claimant permanently and totally disabled be sustained. The amended provisions of the Act increasing claimant's compensation benefits constitute a valid and constitutional exercise of the legislative function of Congress and Employer/Carrier are liable for the payment of same and should be directed to make immediate payment to the claimant together with interest and additional compensation as provided by the Act.

The Employer/Carrier is liable for services rendered by Israel, Adler, Ronca & Gucciardo to the claimant in connection with the prosecution of this claim in the amount of $— (actual amount requested to be submitted upon date of argument).

Respectfully submitted,

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On Brief

SUPPLEMENTAL APPENDIX

extension of that original infarction at the time.

Subsequent to this, Mr. Salzano had never been able to return to work because of his heart condition and this, of course, had been superimposed upon pre-existing narrowing and/or hardening of the coronary arteries or heart diseases, which had up to this time been silent, and as a result of this episode, he was considered totally disabled at least by me when I saw him, as well as another physician.

I have continued to examine him up-to-date, as per my reports and find him to be still totally disabled and the actual diagnoses are held, postero-lateral myocardial infarction, with extension.

Pre-existing underlying silent and/or hardening of the coronary arteries or coronary heart disease and he has syndrome due to coronary insufficiency requiring nitroglycerin several times a day for the relief of chest pain.

Q Is the diagnosis you made causally related to the trauma of January 3, 1966?

A Yes.

Q Doctor, is further treatment and observation indicated?

A Yes.

Q And, doctor, could you tell us with a reasonable degree of medical certainty if the condition is permanent?

A Yes.

Q Could you tell us as of what day or date that this

condition would be considered permanent?

A Well, in retrospect, we would have to say that that occurred as of the date of his heart attack, January 3, 1966.

The reasons for this are as follows:

Number one, there has been no other indication for his recovery from his original episode and the subsequent episode in April and there has been no decrease in his symptomology.

It has remained more or less the same, and perhaps, worse at times, and better at times but no permanent or definite improvement and he continues to require the taking of nitroglycerin sublingually several times a day, which means more than several pains a day, but only requires the use of nitroglycerin several times a day and able to walk only one average city block at a slow pace before having to stop for a shortness of breath.

Thus, he is incapable of doing anything requiring transportation, other than a private car.

He cannot use public transportation because of this and he would require a private car to get about.

He is totally disabled insofar as any form of gainful employment is concerned.

He certainly cannot do the work of a longshoreman anymore. He cannot do any work as far as I am concerned.

Q Doctor, I want you to assume that this man is not a

longshoreman but a subdivision thereunder, namely, a marine carpenter, who shores cargo on board a vessel and with that assumption in mind, doctor, and in view of what you stated, as to the degree of disability and permanency, would that change your opinion any, the fact that he is a marine carpenter?

A No.

This is still work that based on history alone requires physical effort or exertion.

If he had shown improvement within a year or two of his original heart attack and returned to a status more or less similar to that which existed prior to his heart attack, then he would be able or capable of doing light work but since he never returned to status quo and no indication that he will and the permanency is obvious and he must be considered totally disabled.

Q For the purpose of setting a specific date as to when this was permanent, can you tell us with a reasonable degree of medical certainty whether it would be considered permanent as of November 26, 1972?

A Oh, yes.

Q Doctor, what does PVC mean?

A Premature ventricular contraction.

Q How is that manifested?

A Well, you may feel the occurrence of a beat out of sequence in the peripheral pulse and if you take an

electrocardiogram you will note the presence of these irregular beats and that they emanate in the ventrical rather than the sino-auricular node where all beats in the heart are supposed to, and this is a sign of myo disease.

Q Is the condition found following a myocardial infarction such as you have diagnosed?

A Yes, something permanent, but you don't always find it, because it depends on what stage of myocardial disability is present at that moment.

Q Is it the realm of possibility that in one examination it is absent and in examination it may be present?

A Yes.

Q If the PVC's are present on a subsequent examination, does that indicate a worsening of the condition rather than an amelioration of the condition?

A It means that they are absent at that particular time.

It does not mean anything.

Q Well, from a physical or industrial point of view, does the presence of PVC's indicate or mean anything?

A Yes.

It is a condition which in my opinion indicates that the Claimant is not a candidate for any work and also should be medicated because from such contraction you can -- the PVC, you can develop cardiac standstill and death or ventricular

Q Doctor, did he tell you whether or not when you examined in June of 1972, that he was able to perform any work effort at all?

A No.

Q No, he did not tell you, or he was not able to perform?

A I have no record of it.

Q Did you question him about his work activities at that time?

A Yes, and he said that he was not doing any work.

Q If I told you that it was to the contrary and, in fact, that he worked in a lumber yard in the year of 1971, might that have an adverse or modifying effect on your opinion?

MR. GUCCIARDO: Note my objection for the record.

I realize we are taking the doctor out of turn but that is not the factual pattern here.

JUDGE McGRAIL: I will overrule it.

THE WITNESS: If I was told this man had been work and capable of doing work in a lumber yard, physical labor, that would alter my opinion.

MR. MANES: I have no other questions of the doctor.

REDIRECT EXAMINATION

BY MR. GUCCIARDO:

Q Doctor, could an underlying arterial schlerotic heart disease which is progressive remain asymptomatic for the

entire lifetime of the patient?

A Yes.

Q And, doctor, where you have myocardial damage, does that mean that the muscle of that particular part of the heart has died or what does that mean?

A It means that it has been replaced by scar tissue.

The heart muscle is necrosed or dead and has been replaced by scar tissue.

Q And is the scar tissue the same as normal heart muscles?

A Of course not.

Q And where you have scar tissue forming, doctor, is there not a contraction in the vein or in the artery, I am sorry, the artery, as a result of this scar tissue itself?

A Not necessarily.

The scar tissue -- the veins that would be embedded in that area would either have been destroyed or if not destroyed, would be part of that process of contracture.

Q Where it is part of the process of contracture, does that not further cause a narrowing of the lumin?

A Like I said, if the blood vessel itself is involved in the contracture, it would probably be compressed to the point that it would be destroyed and become part of the scar because the blood vessel that we find in scars are few and far between, and very minute.

Claimant's Exhibit 13.

(Form BEC-207 was marked as Claimant's Exhibit No. 13.)

JUDGE McGRAIL: Does that conclude your statement and your introduction of documents?

MR. GUCCIARDO: Yes, Your Honor.

JUDGE McGRAIL: Mr. Manes?

MR. MANES: Yes, Your Honor.

On behalf of the respondent, employer and carrier, our position is simply this: That this Claimant does not have a permanent total disability.

In reference to the issue of the work activities in August of 1971, we do not go into those for the purpose of claiming work activities at that time because the Claimant's subjective complaints according to Dr. Shub were an integral part of his inevitable conclusion of permanent total disability.

We utilized those work activities which presumably had been denied as a means of acknowledging the credibility of the Claimant and so impairing his relations of his non-work activities to Dr. Shub.

Thus placing some doubt on the efficacy of Dr. Shub's opinion.

Certainly, I do not think it is feasible to determine that any of the Deputy Commissioners considered the work activities because we only became privy to the information in

Q Doctor, it appears you examined this Claimant on four separate occasions from 1966 up until 1970, is that correct?

A Five.

Q Five is correct.

I stand corrected. I am sorry.

I did not count the one in 1966.

Would it be fair to characterize your opinion as to disability as being the same from 1966 right up to 1973 and that is that it was a mild partial disability?

A Yes.

Q So, as far as you are concerned from the medical point of view and from an industrial capacity he remained essentially the same over those periods of years?

A In a general sort of way.

Obviously, the other coronary arteries are thickening up a bit and he still has a mild partial disability.

Q Doctor, you testified in this case previously on April 25, 1967, is that correct?

A I don't recall.

MR. MANES: Excuse me.

I have to object to the question.

This is a different proceeding than what the doctor testified to.

BY MR. GUCCIARDO:

this development insofar as cognizance of this most important factor in the person when it is not adequately taken care of.

Many doctors feel, or some doctors feel, that if they get a person back to work and the work must be of the appropriate time, and not one that creates a lot of symptoms, or symptoms that cannot be more or less controlled with appropriate medication and advice, but the doctor feels that something is going to happen to that person some day, and he has had one heart attack and, therefore, don't do anything and from that point on the patient leads a different kind of life, obviously.

Socioeconomic factors interfere and family life and other aspects of living, and this is the part that I am referring to under that one simple little word of psychogenic deterioration.

Q Doctor, is it not true that the patient himself does not know he is undergoing this psychogenic deterioration?

A He knows it because he is developing all kinds of symptoms, irritability, frustration, insomnia, loss of appetite or he might eat too much and you push and increasing the weight in many of these cases, which is in itself a detrimental aspect of the whole problem.

Q The point I wanted to make, doctor, is whether it is a psychogenic basis or an organic basis, and is it not true that it is just as disabling in either event?

A That depends on the doctor again and the patient.

If there is a good doctor-patient relationship and the doctor is of the hopeful type and feels that restoring him to some form of productive work is going to avoid all these problems that we have been talking about, all these symptoms, then that person is going to do better and not going to become introspective at all or not as much and not have this turning inside himself rather than doing something in an external productive sort of way which makes him feel better.

He may have an occasional pain but the pain will be due to the involvement of other coronary arteries depending on how advanced they are in the narrowing process, but the psychogenic aspect can clear up entirely.

This requires firm encouragement and reassurance.

Q Doctor, the psychogenic aspect precipitated by the original coronary episode?

A There is a soil in which things will grow well or grow poorly.

This soil is that person's makeup from the moment he is born.

I am not going into this big subject but some people can cope with problems as we all know a lot better than other people with exactly the same type, whether it is rent or relationships with people or members of a family or a boss or whatever.

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systole, this could also be the result of the pre-existing hardening of the arteries; am I correct?

A It could be--the angina and the extra-systoles.

Q Is that what disables him today?

A Well, he has symptoms in addition to this. He has shortness of breath on exertion.

Q Would that be the result of the pre-existing condition?

A That I doubt. It is a loss of heart substance. It is a loss of heart muscle.

THE DEPUTY COMMISSIONER: Doctor, this infarct, is it a permanent damage to the heart?

THE WITNESS: Yes.

Q Is it permanent in the physical sense of the word?

MR. GUCCIARDO: I object to the question. The doctor has already answered it. He says that it has left the heart in a weakened condition.

MR. KELLY: You don't have to testify for him. The doctor is perfectly capable of

CO Ex #6 p87

systole, this could also be the result of the pre-existing hardening of the arteries; am I correct?

A It could be--the angina and the extra-systoles.

Q Is that what disables him today?

A Well, he has symptoms in addition to this. He has shortness of breath on exertion.

Q Would that be the result of the pre-existing condition?

A That I doubt. It is a loss of heart substance. It is a loss of heart muscle.

THE DEPUTY COMMISSIONER: Doctor, this infarct, is it a permanent damage to the heart?

THE WITNESS: Yes.

Q Is it permanent in the physical sense of the word?

MR. GUCCIARDO: I object to the question. The doctor has already answered it. He says that it has left the heart in a weakened condition.

MR. KELLY: You don't have to testify for him. The doctor is perfectly capable of

SA13

Claimant's Exhibit 8 (pages 1-6)

CX = 8

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Second Compensation District

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.	
VINCENT SALZANO, Employee,	COMPENSATION ORDER
- against -	AWARD OF COMPENSATION
AMERICAN STEVEDORES, INC., Employer,	CASE NO. 966-6186
MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier.	

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on the 3rd day of January 1966, the employee herein was in the employ of the employer herein at Brooklyn, in the State of New York, in the Second Compensation District, established pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Michigan Mutual Liability Company;

2. That on said day the employee was performing services for the employer as a marine carpenter aboard a vessel which was afloat upon navigable waters of the United States loading cargo at Pier 1, Brooklyn Army Base, Brooklyn, New York, and sustained accidental injury resulting in his disability;

3. That the employee was steadily employed by the employer as well as other employers as a marine carpenter performing the duties required of his position with-

ous physical handicap or complaint for seventeen years prior to January 3, 1966; that on said day the employee was employed on the main deck; that the cargo being loaded consisted of heavy military equipment which required shoring and bracing; that timber measuring six by eight inches, twelve feet long and weighing approximately one hundred pounds were utilized for that purpose; that the employee reported for work at 8:00 a.m. on that morning and boarded the vessel by means of a gangway; that he was on standby and did no physical labor until 9:00 a.m.; that at that time he commenced picking up timbers described above individually and unassisted and carried them on his shoulder a distance of approximately thirty feet to where the cargo was being secured; that at approximately 10:30 a.m., after carrying about eighteen pieces of timber in such fashion, and while in process of carrying another piece of timber he experienced pain in his chest and broke out into a cold sweat; that he so informed his foreman and coworkers but continued carrying two or three more pieces of timber, after which he was compelled to sit and rest due to recurrent chest pains; that he continued to rest until lunch time (about 11:45 a.m.) when he left the ship by means of the gangway; that he consumed a relatively light lunch and was reporting back to work when, while ascending the gangway the chest pain became more severe; that he informed the timekeeper he was going to the International Longshoremen's Association (ILA) Clinic which he did that date; that he reported to the emergency room at the ILA Clinic where he underwent examination which included an electrocardiogram; that he was hospitalized the same day (Long Island College Hospital) and his condition was diagnosed as a posterior lateral myocardial infarction; that he was discharged from the hospital on January 28, 1966; that subsequent thereto he did not perform any remunerative work nor did he engage in any strenuous activities and remained under the care of his physician; that as a result of increased cardiac symptomology he was rehospitalized on April 18, 1966 for a condition as testified to by his treating physician as an extension of the myocardial infarction which occurred on January 3, 1966;

4. That the work performed by the employee on January 3, 1966 (above described) was heavy and strenuous requiring substantial physical effort and stress; that such effort and stress precipitated the myocardial infarction which occurred on that day and the subsequent cardiac involvement, which constitutes an accidental injury arising out of and in the course of his employment;

5. That the employee's average weekly wage at the time of injury was $190.42;

6. That written notice of the injury was not given within thirty days but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice;

7. That the employer is liable under Section 7 of the Act to furnish the employee with medical treatment, etc., for such period as the nature of the injury or the process of recovery may require; that unaware of the compensability of his claim and the relationship of the injury to his employment, the employee did not request the employer for medical treatment pursuant to Section 7(a) of the Act, and instead, sought medical treatment, including hospitalization, elsewhere and the employer and insurance carrier are liable for all medical and hospital expenses incurred as a result of the injury; that said expenses included $1,230.00 representing services rendered the employee by his physician from January 3, 1966 to April 14, 1967, inclusive, which amount is considered to be fair and reasonable;

8. That the employee was afflicted with preexisting arteriosclerotic heart disease which did not require medical attention, was asymptomatic and did not prevent him from performing his full duties as a marine carpenter and establishing a demonstrated earning capacity of $190.42 a week (his average weekly wage) at the time of the injury;

9. That the employee was born October 4, 1930 and was formally educated to the tenth grade high school; that he has been employed as a marine carpenter all his industrial life; that with due regard to the nature and extent of the employee's injuries, his limited educational and industrial background, his earning capacity is

negligible and as a result of the injury of January 3, 1966 he was totally disabled from January 4, 1966 to May 22, 1967, inclusive, on which date he was still so disabled, and he is entitled to 72 weeks compensation at $70.00 a week for such temporary total disability; that the compensation for temporary total disability amounts to $5,040.00;

10. That the employer and insurance carrier have paid nothing to the employee as compensation;

11. That at the last hearing the employee's attorney entered a motion and request that the costs of these formal hearing proceedings in this claim be assessed against the employer and the carrier under Section 26 of the Act for the reason that, in the view of the attorney, these proceedings have been continued by the carrier and employer on frivolous grounds; that Section 26 of the Act states: "If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings."; that by letter dated January 26, 1966 the employee's attorney notified the employer and the carrier that the employee had suffered a heart injury for which treatment and compensation under the Act were requested; that on or about March 17, 1966 the employer and carrier filed with the Deputy Commissioner a notice of controversion assigning the following reasons: "No accident. No accident arising out of and in course of employment. No notice. No causal relation. No causally related disability. No medical evidence of causally related disability."; that on July 1, 1966 a physician specializing in cardiology examined the employee on behalf of the employer and carrier and submitted a report of the same date in which he concluded that if the history of carrying the heavy beams at work were confirmed then such incident would be "capable of contributing to the occurrence of a posterolateral wall coronary occlusion on January 3, 1966"; that on January 6, 1967 at the first hearing in this claim the

carrier's representative stated that the employer's and carrier's position was "that the claimant did not suffer an accidental injury within the meaning of this statute and further, whatever disability he has suffered since January 3, 1966 is not the result of any injury while employed by American Stevedores Company.", and that the carrier was prepared with its defense of the claim; that at none of the three hearings held in this case did the carrier and employer present testimony or other evidence which would in any way support the stated position; that on reviewing the record at this time there appears lack of information showing the basis of the carrier's controversion of the claim as put forth at the first hearing; that there is lack of information contained in the record to make a determination as to whether or not Section 26 would apply to the circumstances here and before such determination is considered the Deputy Commissioner would require further hearing and also briefs on the legal questions, from the parties; that further there is insufficient information in the record at this time to determine whether the provisions of Section 14(e) apply and if they apply the date that such provisions took effect in this case; that if the claimant desires to have these matters determined request should be made in writing by himself or his attorney to the Deputy Commissioner, after which further hearing on the application of Sections 14(e) and 26 will be had;

Upon the foregoing Findings of Fact the Deputy Commissioner makes the following:

AWARD

That the employer, American Stevedores, Inc., and the insurance carrier, Michigan Mutual Liability Company, shall pay to the employee compensation as follows: 72 weeks at $70.00 a week from January 4, 1966 to May 22, 1967, inclusive, which is $5,040.00 for temporary total disability. The employer and carrier having paid nothing to the employee as compensation, there is due and payable $5,040.00, which amount the employer and insurance carrier are DIRECTED to pay forthwith in one sum, less attorney fees hereinafter provided, and to continue payments in bi-weekly

installments from May 23, 1967 at $70.00 a week during the continuance of such temporary total disability or until otherwise ordered.

A fee in the amount of $2,000.00 is approved in favor of Israel, Adler, Ronca & Gucciardo, Esqs., 160 Broadway, New York, New York 10038 for services rendered the claimant in the presentation of his claim and made a lien on the compensation due.

Given under my hand and filed at 321 West 44th Street, New York, N. Y. 10036, this 31st day of May 1967.

Michael J. Collura

Deputy Commissioner
Second Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, his attorneys, the employer and the insurance carrier, at the last known address of each, as follows:

Mr. Vincent Salzano	- 529 11th Street, Brooklyn, New York 11215
Israel, Adler, Ronca & Gucciardo, Esqs.	- 160 Broadway, New York, New York 10038
American Stevedores, Inc.	- 67 Broad Street, New York, N.Y. 10004 - Attn: Warren Green
Michigan Mutual Liability Company	- 100 Church Street, New York, N. Y. 10007

Michael J. Collura

Deputy Commissioner
Second Compensation District

Mailed: May 31, 1967

Carrier's No: 90-CUS-251586

NOTICE OF APPEAL OF CLAIMANT VINCENT SALZANO

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

- -x

VINCENT SALZANO,
Claimant-Petitioner

Case No. 74 LHCA 2 60

-against-

MERICAN STEVEDORES, INC.
Employer

MICHIGAN MUTUAL LIABILITY CO.
Respondents.

- —x

SIRS:

PLEASE TAKE NOTICE that VINCENT SALZANO, the claimant, does hereby appeal to the Benefits Review Board from the decision and order of the Administrative Law Judge, Edward H. McGrail, filed in the office of the Deputy Commissioner, Second Compensation District on November 22, 1974.

Pursuant to Section 802.907 of Chapter VII of Title 20,C.F.R., the following information is provided:

1. The full name and address of the petitioner is VINCENT SALZANO, 54 Wood Hollow Road, Great River, Long Island, New York.

2. The full name and address of the employer is American Stevedoring Company, 11 Broadway, New York,New York 10004.

3. The full name of and address of the carrier is Michigan Mutual Liability Company, 1900 Hempstead Tnpk., East Meadow, New York, New York 11554.

Notice of appeal of Claimant Vincent Salzano

4. There are no other known parties in interest.

5. The case file number is 74 LHCA 266.

6. The Decision and Order being appealed from was filed Nov. 22,1974.

7. The petitioner is being representd by the firm of ISRAEL,ADLER, RONCA & GUCCIARDO, 160 Broadway, New York, New York 10038.

8. The employer and carrier are representd by the firm of MINORE & MANE,ESQS., 11 Park Place, New York, New York 10007.

Dated: New York,N.Y.
December 9, 1974.

BY: A.C. GUCCIARDO
A Member of the firm of
ISRAEL,ADLER,RONCA & GUCCIARDO
Attorneys for the Petitioner
160 Broadway
New York, New York 10038

TO:
Minore & Manus,Esqs.
11 Park Place,
New York, New York

John D.McLellan,Jr.
Deputy Commissioner
U.S.Department of Labor (OWCP)
1515 Broadway
New York, N.Y.

Office of the Solicitor
Division of Employee Benefits
Room 4221-Main Labor Building
Washington, D.C.20210

CERTIFICATE OF SERVICE

I, DONNA GARRITY, do hereby certify that the foregoing Claimant's Brief was mailed by regular mail to the Office of the Solicitor, Room 4221 - Main Labor Bldg, Washington, D.C. 20210, and to Minore and Manes, attorneys for the employer/carrier, 11 Park Place, New York, NY 10007 , on December 16, 1974.

DONNA GARRITY, Secretary for
the firm of
ISRAEL, ADLER, RONCA & GUCCIARDO

NOTICE OF APPEAL OF DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S.DEPARTMENT OF LABOR

U.S.DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
- -x

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR
Petitioner

v.

AMERICAN STEVEDORES, INC.
and
MICHIGAN MUTUAL LIABILITY COMPANY
Respondents

- -x

Notice of Appeal

The director, Office of Workers' Compensation Programs, United States Department of Labor hereby appeals to the Benefits Review Board from the compensation order of Administrative Law Judge Edward H. McGrail, filed on November 22, 1974, in the Office of Deputy Commissioner, Second Compensation District, in the case entitled: In the Matter of Vincent Salzano, claimant, v. American Stevedores, Inc., employer and Michigan Mutual Liability Company, carrier, on the ground that said order is not in accordance with law.

In compliance with Sec.802.207 of the Rules of Practice and Procedure of the Benefits Review Board, 20 CFR Sec.802.207 (1973), petitioner sets forth the following information:

1. Petitioner's name and address:
   Herbert A. Doyle, Jr.
   Director Office of Workers' Compensation Programs
   United States Department of Labor,
   Washington, D.C. 20211

Notice of Appeal of Director etc etc

2. Employee's Name: Vincent Salzano
Represented by :

Angelo C. Gucciardo,Esq.
Israel,Adler,Ronca & Gucciardo
160 Broadway
New York, New York 10038

3. Other parties in Interest:

American Stevedores, Inc.
and
Michigan Mutual Liability Company
Representd by:
Joseph S. Manes,Esq.
Minor & Manes
11 Park Placa,
New York, New York 10007

4. The file number: 74 LHCA 266
(formerly Case No. 96-66196)

5. Filing date of Decision and order:
November 22, 1974

6. Petitioners Representatives:
William J. Kilberg
Solicitor of Labor

Marshall H. Harris, Associate Solicitor

Linda Carroll, Attorney
Division of Employe Benefits
U.S.Department of Labor
Washington, D.C. 20210

Respectfully Submitted,

WILLIAM J. KILBERG
Solicitor of Labor

Notice of Appeal of Director, etc etc.

MARSHALL H. HARRIS
Associate Solicitor

LINDA CARROLL
Attorney
United States Department
of Labor
Room 4221-Main Labor Bldg.
Washington D.C. 20210
202-961-5414

Attorneys for the Director,
Office of Worker's Compensation
Programs.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 1974, I served a copy of the foregoing Notice of Appeal on Angelo C. Gucciardo, Esq., Isseks, Adler, Ronca and Gucciardo, 160 Broadway, New York, New York 10038, attorney for the claimant, and on Joseph S. Manes, Esq., Mineo and Manes, 11 Park Place, New York, New York 10007, attorney for the employer and carrier, by mailing a copy thereof by certified mail to said attorneys.

Linda L. Carroll
Attorney
U. S. Department of Labor

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 23 day of Jan 19 76, at 2:00 o'clock P.M. he served the annexed Brief and Supplemental Appendix of Respondent, Vincent Salzano in Re: American Stevedores, Inc., and Michigan Mutual Liability Ins. Co., v. Vincent Salzano and Director, Office of Workers Compensation Programs upon

SEE SECOND SHEET Esq(s)., Attorney(s)

for SEE SECOND SHEET

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

SEE SECOND SHEET

that being the address designated in the last papers served herein by the said attorney. Joseph Boselli

Sworn to before me this 23rd day of January 19 76

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1976

SECOND SHEET

1) Minore & Manes
11 Park Place
New York, N.Y. 10007

(Attorneys for American Stevedores and Michigan Mutual Liability Ins. Co.)

2) William J. Kilberg
Solicitor of Labor

Marshall H. Harris
Associate Solicitor

Linda Carroll
Attorney
U.S. Dept. of Labor
Room 4221-Main Labor Bldg.
Washington, D.C. 20210

(Attorneys for Director, Office of Worker's Compensation Programs)

Joseph Bosselli

Sworn to before me this 23rd
day of January 1976

John Allusick

JOHN ALLUSICK
Notary Public, State of New York
No. 31-4602133
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Commission Expires March 30, 1976

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